IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 428 - 430

HOSKYN & CO., INC., *et al.*,
Petitioners.

—against—

SILVER LINE, LTD.,
Respondent.

INTERNATIONAL STANDARD ELECTRIC CORP., *et al.*,
Petitioners,

—against—

SILVER LINE, LTD.,
Respondent.

CHINA GENERAL EDISON CO., INC.,
Petitioner.

—against—

SILVER LINE, LTD.,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

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The Petition of:

HOSKYN & CO., INC.; CIA GRAL DE TABACOS DE FILIPINAS; LIZARES & CO., INC.; PACIFIC COMMERCIAL COMPANY; CASTELLS Y CIA; and ELIZALDE & CO., INC.; and

INTERNATIONAL STANDARD ELECTRIC CORPORATION and A. E. CHEW; and

CHINA GENERAL EDISON CO., INC.

for writs of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Statement of the Matter Involved.

Your petitioners, Hoskyn & Co., Inc., et al., were the owners of cargo laden in United States ports in October and November, 1936, on the British motorship "Silvercypress", owned and operated by respondent, for carriage to Ilo Ilo, Philippine Islands, and other Far Eastern ports. Fire broke out on the vessel on January 13, 1937, while she was discharging cargo at Ilo Ilo and a large part of petitioners' cargo was damaged or destroyed as the result of the fire or means employed to extinguish it.

Certain of the petitioners were required by respondent to pay a second freight covering on-carriage from Ilo Ilo to ports of ultimate destination of that part of the cargo which was not destroyed, although full freight to the ultimate destination had been prepaid to respondent at the time of original shipment; and certain petitioners were required to make deposits of cash with respondent as security for contributions in general average alleged to be due in connection with the fire.

Eighteen separate libels were filed by 123 different cargo owners against the respondent in the United States District Court for the Southern District of New York to recover for the losses suffered by cargo, the amounts of the second freights, and the amounts of the cash deposits. The damages suffered by the cargo owners totaled approximately $500,000, including cash deposits required by respondent totaling about $125,000. As a matter of convenience the parties chose four libels as typical of all and it was stipulated that the rights of the parties in the other 14 libels should abide by determination of these four cases. Only these four libels were tried.

The cargo owned by the petitioners-libellants in the case of *Hoskyn & Co., et al.* was totally destroyed as the result

of contact with fire and water; that of the petitioners-libellants in the case of *International Standard Electric Corp., et al.* sustained partial damage through contact with fire and water and these cargo owners were required to pay second freights for on-carriage of the salved cargo from Ilo Ilo to the ultimate ports of destination. The District Court found that the respondent was entitled to exoneration from liability for the losses suffered by these libellants under the provisions of the Fire Statute (46 U. S. C. Sec. 182),* and decrees dismissing both these libels were entered (R. 1342-1343). On appeal to the Circuit Court of Appeals for the Second Circuit, those decrees were affirmed.

The cargo owned by the petitioner-libellant in the case of *China General Edison Co., Inc.* sustained partial damage through contact with fire and water and that company was required by the respondent to make a general average deposit and pay a second freight. In this case an interlocutory decree was entered in the District Court (R. 1344-1345) whereby it was ordered that the libellant recover from respondent the amount of the general average deposit which respondent required be paid over as security, unless within 12 months from the entry of the decree (or within such additional time as might be allowed) respondent should make an accounting by the issuance of a proper general average statement; and if a proper general average statement were issued within the period set and showed that the general average deposit paid over by this libellant exceeded the contribution set out as due, the decree provided that it should recover that excess only.

In all other respects this libel was dismissed, the District Court finding that the respondent was exonerated

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* Printed in Appendix.

from liability, under the provisions of the Fire Statute, for the loss of and damage to this libellant's cargo resulting from the fire or water used to extinguish it, or for the second freight; and the effect of the court's decree concerning the recovery of the general average deposit was that this libellant was held liable for contribution in general average, the respondent merely being required to make an accounting establishing the amount of the liability, so that it might be determined if the deposit given as security exceeds the libellant's liability. The respondent has made no accounting of any kind in the more than seven years since the deposits were collected.

As all parties and the courts below are in accord that cargo's liability for contribution in general average is governed by the same considerations which govern respondent's liability for the loss of the cargo resulting from the fire, the *China General Edison* case (excepting as to the respondent's obligation to account for any balance of the general average deposit) is governed by the same principles as govern the cases of *Hoskyn & Co., et al.* and *International Standard Electric Corp., et al.*

The decree in the *China General Edison* case was also affirmed on appeal.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 143 F. (2d) 462. It appears in the record at pages 1369-1375. The opinion of the United States District Court for the Southern District of New York is not yet officially reported. It appears in the record at pages 1296-1332. Its supplemental memorandum (not yet reported) appears in the record at pages 1332-1337. The Findings of Fact and Conclusions of Law of the District Court appear in the record at pages 1337-1341.

Petitioners examined but one factual and one expert witness at the trial. They relied almost entirely upon the testimony of respondent's witnesses and respondent's records. The facts outlined in this petition will be those found by the Circuit Court of Appeals supplemented by reference to the findings and opinion of the District Court.

Jurisdiction.

Jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. Code, Sec. 347).

Nature of the Case.

The M/S "Silvercypress" was in large part electrically operated: her auxiliary machinery, winches, ranges, and lighting system were electrical. Electricity was provided by four generator units situated two on the port side and two on the starboard side of the engine room. Each unit consisted of a generator connected to a Diesel engine. #1 and #2 generator units were situated on the starboard side of the engine room and #3 and #4 units on the port side.

Upon the arrival of the "Silvercypress" at Ilo Ilo early on the afternoon of January 12th, 1937, the main propelling machinery was shut down. Generator units #1 and #2 were used from that time to the time of the fire to provide electricity for the winches used in the discharge of cargo, and for other purposes.

A fuel oil fire broke out at 3:45 A. M. on January 13th, which was caused by the Diesel engine forming part of

the #2 generator unit. The fire spread with great rapidity and intensity, flames soon mounting out of the engine room skylight. As cargo was being discharged at the time, the vessel's hatches were open. Various awnings and other material on deck became ignited and pieces fell through the open hatches aft and ignited the cargo. Fire was also communicated to the hold immediately forward of the engine room and eventually to the afterpeak tank containing kerosene oil. The fire burned for seven days before it was extinguished. The cargo stowed in the after holds, the afterpeak tank, and in the hold immediately forward of the engine room was either totally destroyed or sustained very serious damage either from fire or water used to extinguish the fire, or both. The vessel herself was reduced to a wreck.

The respondent pleaded the Fire Statute (46 U. S. C. Sec. 182) in defense against the suits. That statute provides that a vessel owner shall not be liable for loss or damage to cargo resulting from fire "unless such fire is caused by the design or neglect of such owner". Petitioners contended that the fire resulted from the respondent's personal neglect and that, therefore, it was not entitled to exoneration under the Fire Statute.

The Decisions of the Courts Below.

Both the Circuit Court of Appeals and the District Court found:

1. That the fire in the engine room of the "Silvercypress" was caused by the auxiliary Diesel engine forming part of the #2 generator set (C. C. A., R. 1369, 1371, 1373, 1374-1375; D. C., R. 1306, 1323-1327);

2. That that engine was unseaworthy at the time the

fire broke out and had been unseaworthy for a number of months (C. C. A., R. 1371, 1374; D. C., R. 1330-1331);

3. That the unseaworthiness of the #2 auxiliary engine existed by reason of respondent's personal neglect (C. C. A., R. 1371, 1374; D. C., R. 1330-1331);

4. That the unseaworthiness of the #2 engine was of a type which presented the danger of fire through overheating and excessive vibration, and that the fire which broke out could have been caused by this unseaworthiness (C. C. A., R. 1371, 1374; D. C., R. 1332);

5. That if the unseaworthiness of #2 engine caused the fire, respondent is liable to petitioners for their losses (C. C. A., R. 1371, 1374; D. C., R. 1330-1331).

It appears also, from the opinion of the District Court, that an additional fire hazard was created by the accumulation on the engine room tank tops and in the bilges, of lubricating oil which leaked out of the crank cases of the main engines of the "Silvercypress" by reason of the personal neglect of the respondent. In fact, this is one of the dangerous conditions to which the District Court referred in the following passage in its opinion:

> "These letters gave the owners notice of serious existing defects which certainly required specific attention by their accredited representative in Hongkong, and the indifference and inattention of Stevenson and Cropley, is incredible" (R. 1313; brief, *infra*, pp. 28-33).

Although there were two engineers on duty in the engineroom when the fire started, the fire spread so rapidly that it could not be controlled.

Respondent's superintending engineers who were familiar with the "Silvercypress", the engineers who served on her, the experts examined by petitioners and respondent, and the courts below, collectively advanced but two possible causes for the presence of a quantity of loose fuel oil in the vicinity of the #2 engine which could become ignited:

1. Fracture of one of the fuel lines on the top of the engine leading oil to the cylinders under a pressure of 3500 pounds.

2. Fracture of the main supply pipe leading oil from the main supply tank to the engine itself under a pressure of less than 10 pounds.

The courts below were in accord that if the loose fuel oil which became ignited resulted from the fracture first mentioned, the respondent would be liable: that fracture would have resulted from the established unseaworthiness of the engine resulting from respondent's neglect (C. C. A., R. 1371, 1373, 1374; D. C., R. 1310, 1331-1332). A fuel oil fire a few months before, on the #4 engine, had resulted from the fracture of one of the fuel lines on the top of that engine; that fracture had resulted from the unseaworthiness of that engine; and oil spraying from the fracture became ignited because the engine was overheated (R. 1310).

The lower courts held that if the loose fuel oil resulted from the second of the fractures mentioned above (*i. e.*, a fracture of the main supply pipe), respondent would not be liable therefor under the Fire Statute. In view of the fact that both pipes were attached to the unseaworthy engine and therefore were subject to similar stresses, we are unable to understand this distinction in

liability, but we shall assume it for the purposes of this petition.

The courts below held that respondent was entitled to exoneration from liability under the Fire Statute because respondent's expert testimony persuaded them that leakage of fuel oil from the overhead main supply pipe—if there was any—was a possible explanation for the loose fuel oil around the engine which became ignited. This expert evidence is wholly unsupported by any factual evidence to show that there ever was any leakage from the overhead main supply pipe. On this point the Circuit Court of Appeals said (R. 1374):

> "A bit of hearsay* in a report by one of the engineers that there was such a leak was not given credence by the judge, however, and there was nothing else to put the idea above the level of surmise."

There was no evidence that the main supply pipe was in any way defective or weak so as to present the danger that it might fracture or leak.

The Questions Presented.

A.

Where it appears that a defective condition due to the shipowner's personal neglect supplies a natural and probable explanation of a fire on shipboard, and there is no factual evidence to support any other explanation, can the shipowner escape liability under the Fire Statute by merely calling experts to speculate as to other possible causes?

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* This evidence was excluded excepting for its bearing on the credibility of the witness.

B.

Where it is definitely established that the fire was caused by a defective engine and that the defective condition of the engine created a fire hazard and was due to the personal neglect of the shipowner, can the shipowner escape liability under the Fire Statute by calling experts to testify (in the absence of any factual basis for their testimony) that the defective engine might have caused the fire in a manner for which the owner would not be responsible?

Petitioners do not question the rule applied by the lower courts (C. C. A., R. 1370; D. C., R. 1297) that where a shipowner sets up the Fire Statute as a defense in a suit brought by a cargo owner to hold him liable for loss of cargo by fire, the cargo owner must sustain the burden of establishing that the fire resulted from the shipowner's personal neglect.

Petitioners agree also that no matter how unseaworthy the "Silvercypress" was by reason of respondent's neglect, they cannot recover unless such unseaworthiness contributed to the loss of their cargo by fire.

The question presented here is whether in the face of a proved condition of unseaworthiness creating a fire hazard and adequate to explain the fire, and due to the long continued neglect of the shipowner himself, the shipowner can escape liability by merely pointing to other possible explanations of the fire, without submitting any evidence whatever to support such hypothetical explanations.

Stated in another way, the question is whether the cargo owner makes out a case by showing that the fire was directly caused by a defective engine; and that the defective condition of the engine created a fire hazard

and was due to the shipowner's personal neglect. That is exactly what the cargo owners proved in the present case, and their proof was held insufficient because they did not negative the theoretical possibility that the fire (although admittedly started by the defective engine) might have started in some way for which the shipowner would not have been liable. The Circuit Court of Appeals pointed out that this theory rests on mere "surmise" (R. 1374), and its statement of the theory (expressed almost entirely in the subjunctive mood) clearly shows its highly speculative character (R. 1371, 1374-1375).

We ask the Court to bear in mind that this is not a case of a vessel lost with all on board, where no evidence is available to either side. On the contrary, all of the engine room personnel of the "Silvercypress" survived the fire, and most of them were called by the respondent at the trial; but not one of these witnesses was interrogated with respect to any leakage or breakage of the main fuel supply pipe, on which respondent's experts based their alternative explanation of the fire. Moreover, it appears from the opinion of the District Court that one of the witnesses called by the respondent was standing immediately under that pipe when the fire broke out, so that it would have been humanly impossible for any substantial leakage from the pipe to escape his notice (R. 1306, 1308, 1328, 1329). With all this factual testimony available to it the respondent chose not to present it but to rely solely on the speculations of experts to support its theory.

If the defects proved in this case had been due to design instead of neglect, we submit that a man could easily be convicted of arson on this record, under the rule applied in criminal cases that guilt must be proved beyond a reasonable doubt.

Reasons for Allowance of the Writ.

I.

In this case the petitioners were required to carry a heavier burden than the prosecutor in a criminal case; they were required to prove a universal negative. The application of such a rule in cases arising under the Fire Statute is wholly unsupported by authority; it is squarely contrary to the rule applied in the First, Fourth and Sixth Circuits as well as the Second Circuit, in fire cases not involving the Fire Statute, and to the rule applied in the Fourth Circuit (the only other circuit where the question has been squarely presented) in cases under the Fire Statute.

In *Int. Mercantile Marine* v. *W. & A. Fletcher Co.*, 296 Fed. 855 (C. C. A. 2), suit was filed by a vessel owner against a ship repair company to recover for damage to a ship resulting from fire which broke out during the course of repairs. There was evidence that the negligence of the repairer's employees presented the danger of fire but no direct evidence that the fire resulted from that negligence. The Circuit Court of Appeals for the Second Circuit held (at p. 858):

> "Liability is measured by the known dangers to be guarded against, and if care according to the circumstances is wanting, the natural inference is that injury accrues from the known danger—it is caused by the lack of care. The blowtorch near remover and waste was negligence; the danger of fire was well known, and we find adequate cause proximately existing in that negligence for the ensuing loss."

See, also:

Standard Oil Co. of N. Y. v. *Pitcher Co.*, 289 Fed. 678 (C. C. A. 1);

Brown v. *Standard Oil Co. of N. Y.*, 247 Fed. 303 at p. 306 (C. C. A. 2);

Interlake Iron Corp. v. *Gartland S. S. Co.*, 121 F. (2d) 267 at p. 270 (C. C. A. 6).

In *U. S.* v. *Charbonnier*, 45 F. (2d) 174 (C. C. A. 4), suit was by a cargo owner against a vessel owner to recover for fire damage to cargo and the vessel owner pleaded the Fire Statute in defense. It was established that unseaworthiness of the vessel existing by reason of the owner's personal neglect presented the danger of fire but there was no definite proof that such unseaworthiness caused the fire. The Circuit Court of Appeals for the Fourth Circuit pointed out that the vessel owner had offered expert testimony of a possible cause of the fire for which it would not be liable but it held that by reason of the vessel owner's personal neglect (at p. 176) "a situation was created which, in the opinion of the experts, made possible a fire, and helped to bring about the catastrophe which took place"; and the vessel owner was held liable.

In *The Bank Line, Ltd.* v. *Porter*, 25 F. (2d) 843 (C. C. A. 4), in considering causal relationship under the Fire Statute, the Circuit Court of Appeals for the Fourth Circuit said (at p. 846):

> "Knowledge of facts that may be reasonably expected to lead to certain results imposes a direct liability for those results."

In *Christopher* v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1) and *The New Berne*, 80 F. (2d) 244 (C. C. A. 4), fires broke out in the engine rooms of different vessels resulting in loss of life. The vessel owners filed petitions for limitation of their liability.* In each case the engineer who was the sole witness to the outbreak of the fire lost his life in the disaster and there was, therefore, no definite evidence concerning the cause of the fire. However, it was found in both cases that the respective vessels were unseaworthy with the privity of their owners and that the unseaworthiness presented the danger of fire. In both cases the petitioning vessel owners took the position that there was no proof that the fires resulted from the unseaworthiness and a number of other possible causes for the outbreak of the fires were advanced.

In *Christopher* v. *Grueby*, after discussing the possible causes of the fire, the Circuit Court of Appeals for the First Circuit said that whatever may have been the precise cause (at p. 13):

> "it can reasonably be found that the negligent situation which the owners had created and/or suffered to exist in the engine room, and their failure to furnish adequate means 'ready for immediate use' for 'promptly and effectually extinguishing gasoline' one or both, were the cause of the loss of the ship, of the lives of 12 of the crew, and of the injury of three others."
>
> "If the engineer was careless in pouring gasoline when the engine or engines were running, nevertheless the owners could reasonably have foreseen that he might do so, and their negligence in suffering this

* The limited liability statute, 46 U. S. C. 183, is printed in the Appendix.

> fire hazard to exist in the engine room could be found to be the proximate cause of the disaster, and we think it was."

In *The New Berne* the Circuit Court of Appeals for the Fourth Circuit said (at p. 247) that the origin of a fire—

> "must in most cases be established by circumstantial evidence; and the probative effect of such evidence ought not be disregarded because the ingenuity of counsel may suggest a number of ways in which such fires might have originated."

The court discussed the circumstantial evidence available which made it probable that the fire resulted from the vessel's unseaworthiness and said (at p. 246) that it would be foolish to attribute the origin of the fire to the speculative hypotheses advanced by the vessel owner. In dealing with one of these hypotheses the court said (at p. 246):

> "It would be inexcusable to attribute the origin of the fire to such a cause, when a reasonable and probable explanation is at hand in the use of the open flame torches."

The petitions for limitation of liability were denied in both cases.

II.

The questions presented are of great commercial importance: a high percentage of losses of cargo at sea results from fires on shipboard, and the cargo owner is rarely in a position to offer direct evidence of the precise cause of the fire which destroys his cargo, although he may be able to establish by subsequent survey or other

investigation that the vessel owner's neglect permitted a condition presenting the danger of fire to exist, and he may be able to rebut evidence as to other possible causes, where any such evidence is offered.

Although the language of the Fire Statute is conditional, the decision in the present case, in effect, nullifies the condition and makes the shipowner's exemption absolute; for the shipowner can always suggest some theory on which he would not be liable, provided he is not required to produce any evidence in support of his theory.

III.

The decision in the present case rests upon an erroneous interpretation of this Court's decision in the case of *Earle & Stoddart* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420. The *Earle & Stoddart* case is cited and relied upon by both of the lower courts, although it did not involve any question of causal relation, which is the only question involved here. It appears to be interpreted in the Second Circuit as requiring that the Fire Statute be strictly construed against the cargo owner, and as precluding any inferences from established facts, such as are normally drawn in other cases. On this point we cite the following passages from the opinion of the District Court (R. 1330-1331):

> "I am satisfied that the 'Silvercypress' was unseaworthy on voyage 16 and throughout voyage 17 up to the time of the fire, in the way of the auxiliaries, by reason of the neglect of the owners, but the libelants have failed to establish that the cause of the

fire was *solely* attributable to such unseaworthiness." (Italics ours.)

* * *

(R. 1332):

"The respondents sacrificed that care and caution which they were obligated to exercise to insure protection and safety to the vessel.

The limitation of turn-arounds in port and the reluctance to spend money for shore labor outside of Hong Kong demonstrates this. The failure to have the vessel overhauled at Hong Kong after notice of conditions on voyage 16, from New York to Capetown, or at Manila, and the certification by Cropley that the vessel was seaworthy when she sailed from New York on voyage 17 deserves condemnation. *But considering the history of the fire statute* (See *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420, and references there cited) *I feel it must be strictly construed, and therefore the libels are dismissed, without costs.*" (Italics supplied.)

Wherefore, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases entitled on its docket:

"Hoskyn & Co., Inc., et al., Libellants-Appellants, v. Silver Line, Ltd., Respondent-Appellee, Docket #19145; International Standard Electric Corp., et al., Libellants-Appellants, v. Silver Line, Ltd., Respondent-Appellee, Docket #19146; and China General

Edison Co., Inc., Libellant-Appellant, v. Silver Line, Ltd., Respondent-Appellee, Docket #19147;

and that the said decrees of the United States Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray, etc.

HOSKYN & CO., INC.;
CIA GRAL DE TABACOS DE FILIPINAS;
LIZARES & CO., INC.;
PACIFIC COMMERCIAL COMPANY;
CASTELLS Y CIA;
ELIZALDE & CO., INC.;
INTERNATIONAL STANDARD ELECTRIC CORPORATION;
A. E. CHEW;
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By D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Jurisdiction.

These are suits within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article III, Sec. 2, of the Constitution of the United

States of America and under Section 240 of the Judicial Code as amended by the Act of Feb. 13, 1925, 43 Stat. 938 (28 U. S. C. Sec. 347).

Statement.

The facts stated in the petition, based on the opinions below, will not be repeated here. However, the opinion of the Circuit Court of Appeals discloses that it misconceived one of the basic technical principles which is involved in the issues presented by this petition and in the appeal below; and a principle which is not in controversy between the parties.

In discussing the petitioners' submission that the fire resulted from the fracture of a fuel oil pipe on the top of the #2 auxiliary engine, through which the oil was pumped at a pressure of 3,500 lbs., the court said (R. 1374):

> "If this did happen fuel oil might have been sprayed onto the exhaust pipes, which were normally at a temperature higher than the flash point of the fuel oil, or onto the cylinder head whose temperature might also have been above the flash point of the fuel oil. If the oil had been so sprayed, a fire, of course, would have been the result."

It will be noted that the court assumed that if oil was brought to its flash point it would automatically burst into flames; and that the normal operating heat of the exhaust pipes and cylinder heads of the #2 engine of the "Silvercypress" would heat to its flash point loose fuel oil coming in contact with them. This is a misconception of recognized engineering definitions and principles.

The "flash point" of oil is the temperature at which it will give off an ignitible vapor which, however, will merely flash if brought in contact with an igniting agency but will not burn after the agency is withdrawn (Resp. experts, R. 736-737, 471-472, 515-516).

The "fire point" is the temperature at which the oil will give off a vapor which is not only ignitible, if brought in contact with an igniting agency, but the oil will continue to burn after this agency is withdrawn (Resp. experts, R. 737-738, 471, 516).

The "ignition temperature" is the temperature which the igniting agency must have in order to ignite the vapor (Resp. experts, R. 736, 738, 516, 582-583).

It is common ground that while the normal operating temperature of the exhaust pipes, exhaust manifold and cylinder heads of such an engine as the #2 auxiliary engine of the "Silvercypress" might have heated leaking fuel oil to both its flash point and fire point (of not more than 250°—R. 737, 472), the vapor given off at these temperatures must have been subjected to a temperature of nearly 950° to become actually ignited; and that no part of the engine under normal operating conditions would have a temperature which could ignite the vapor (Resp. experts, R. 736-738, 471-472, 516, 582-583).

The misconception of the Circuit Court of Appeals was brought to its attention by a "Petition for Rehearing or, in the Alternative, for Modification of the Opinion" (R. 1376), so that the opinion which this Court was to be asked to review, might more clearly present the issues involved. The Circuit Court of Appeals denied the petition for a rehearing and ignored the petition for modification of the opinion (R. 1380-1384).

As it is common ground that, whatever may have been the source of the loose fuel oil around the #2 engine, its ignition must have resulted from some abnormal con-

dition of that engine, it is important to consider the findings below concerning possible igniting agencies.

The Circuit Court of Appeals found that the timing apparatus of the #2 engine was defective as the result of respondent's neglect (R. 1374); that defective timing would result in "a decrease in power, excessive vibration *and overheating*" (R. 1373); and that it made the #2 engine "more apt to vibrate, *to get overheated*" (R. 1374). It commented that petitioners' expert testimony was to the effect that (R. 1374):

> "If the timing was faulty enough and the engine ran long enough while in that condition, not only might it have become excessively hot but the vibration might have caused a leak in the fuel feed pipe or its connections through which the fuel under 3,500 pounds pressure was flowed into a cylinder through the intake valve."

The court said (R. 1374):

> "If, therefore, the libellants could prove that the fire was started as a result of faulty timing due to the owner's neglect, the Fire Statute would be no defense to this action."
>
> * * *
>
> "But there was no evidence that the faulty timing did in fact overheat the engine just before the fire or that there was vibration which in fact caused a leak in a fuel pipe in the manner described."

The Circuit Court of Appeals pointed out that on the previous voyage of the "Silvercypress" there had been a fire on one of the auxiliary engines (R. 1370-1371). The District Court found that that fire resulted from the fracture of a by-pass valve connected to the fuel oil line leading oil to the No. 4 cylinder of the No. 4 engine; and

ignition of the leaking oil through contact with an "overheated" exhaust manifold (R. 1310). When that fire broke out the timing appartus of the No. 4 engine was defective (R. 1311; Ex. 4-17, R. 1129, offered in evidence, R. 40). Respondent's witness, the second engineer of the vessel, testified that when that fire broke out, one of the manifold branches was red hot (R. 274).

The Circuit Court of Appeals said that if the fire which destroyed petitioners' cargo resulted from the fracture of a fuel oil line on the top of the No. 2 engine and ignition of the leaking oil because of the overheated condition of that engine, respondent would be liable (R. 1371, 1374). The District Court held the same view (R. 1310, 1331).

The respondent sought to establish that the loose fuel oil was ignited by sparks from an open emergency valve which, it urged, was caused to lift because one of the cylinders of the engine became overloaded by reason of the assumed pouring down of fuel oil on the top of the engine from the assumed fracture of the main fuel oil supply pipe. It has been pointed out in the petition (at pp. 9, 11), that there is no evidence that oil reached the engine from the supply pipe, or that that pipe ever fractured, or, indeed, that its condition presented the danger of fracture.

The petitioners have stated (petition, p. 11), in discussing the respondent's theory that fracture of the main fuel supply pipe caused loose fuel oil to pour onto the #2 engine and become ignited, that the District Court commented that one of the respondent's witnesses was standing immediately under this pipe when the fire broke out. That witness testified that not a drop of oil fell on him (R. 952).

The other engineer present testified that he was also under the main supply pipe when the fire broke out and

that no oil fell on him (R. 890-891). The District Court quoted excerpts from this engineer's reports in which he explicitly asserted that there was no fracture of the main supply pipe (R. 1328, 1329, 1330).

As the District Court commented (R. 1306-1307), the activities of the engineers present were directed to closing the supply valve at the forward end of the #2 engine. This valve controlled the flow of oil from the main supply pipe to the engine and thence by way of fuel pumps through the pipes carrying the oil to the respective cylinders. Effort was being made to close this valve because the engineers present were certain that the leakage of fuel oil was from one of the connections on the top of the engine carrying oil to the cylinders (R. 954-955, 891). Naturally, the closing of this valve would have no effect on the leakage of oil from the main supply pipe which the respondent urged must have become fractured.

The District Court's review of the evidence of the engineers present when the fire broke out (R. 1306-1308, 1328-1330) discloses that while they did not see the fracture from which the oil was leaking (the top of the engine was above the level of their heads), they were certain that it was not the main supply pipe visible immediately above their heads; and they assumed, therefore, that it was one of the fuel lines on top of the engine.

Petitioners have said that there is no evidence that the main supply pipe was defective or in such condition as to present danger of leakage. The Circuit Court of Appeals commented that respondent's expert testimony showed (R. 1374) "that leaks sometimes occurred in pipes of this sort for no apparent reason—a pinhole might open up or a packing become leaky".

It will be noted that the Circuit Court of Appeals held that although the unseaworthiness of the #2 auxiliary

engine existing by reason of respondent's personal neglect made that engine so defective that it was apt to vibrate abnormally and become overheated, so that its condition presented a continuing danger of fracture of one of the fuel pipes leading fuel oil to the cylinders under high pressure and the ignition of oil spraying from the fracture by contact with the engine when overheated, it declined to draw the inference that the unseaworthiness of the engine caused the fire because, it said, the overhead main supply pipe might have become fractured, and might have permitted leakage of oil onto the engine.

Specifications of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

(1) In holding that the respondent was entitled to the exemptions of the Fire Statute notwithstanding the fire was caused by a defective engine, the defective condition of which created a fire hazard and resulted from respondent's personal negligence, because the petitioners did not prove that the fire could not have started in some way for which the respondent would not be liable.

(2) In construing the Fire Statute as precluding the inferences from established facts which would have been drawn in any case not arising under that statute.

(3) In holding that the respondent was entitled to the exemption of the Fire Statute although it was established that, whatever may have been the original cause of the fire, respondent's personal neglect contributed to the speed and intensity of the fire.

POINT I.

A vessel owner's liability for loss of cargo by fire is established by proof that unseaworthiness of the vessel existing by reason of its personal neglect created the danger of fire and that the fire could readily have resulted from the unseaworthiness, there being no evidence of any condition which could have caused the fire other than the unseaworthiness.

The discussion of cases appearing in the petition (at pp. 12-15) will not be repeated here.

In *Standard Oil Co. of N. Y.* v. *Pitcher Co.*, 289 Fed. 678 (C. C. A. 1), suit was against the owner of a gasoline filling station for damage resulting from fire alleged to have been caused by the generation of static electricity by reason of the defendant's failure to use a safety chain or device to ground any flow of static current. There was no direct evidence that the fire was thus caused and the defendant advanced the theory that the fire might have been started by sparks from locomotives operating on a nearby railroad or by sparks from the chimney of a nearby house, although there was no evidence of such sparks. The Circuit Court of Appeals for the First Circuit said (at p. 683):

> "It was not necessary that the plaintiff show that a static spark was actually produced; but it was sufficient if conditions and circumstances were shown from which the inference could be reasonably drawn that a static spark was produced."

The court pointed out that as the evidence furnished

> "ground for a reasonable inference that the gasoline vapor was ignited by an electric spark generated as

> claimed by the plaintiffs, it cannot be said that the jury were forced to base their conclusions upon inferences drawn from other inferences instead of proven facts" (at p. 683).

In *Brown* v. *Standard Oil Company of N. Y., et al.*, 247 Fed. 303 (C. C. A. 2), a tug and other property was destroyed as a result of fire in certain oily matter floating on the water in a slip near a sewer discharge. It was established that shortly before the fire a highly inflammable oily sludge was flushed into the sewer by respondent's employees. The respondent established that there were factories and garages which also discharged their waste into the same sewer and it contended that the oily matter on the surface of the water which ignited, might have come from them. It was held that as:

> "that sludge was inflammable; and that the flames burst out a very short time after it was flushed into the river—we cannot regard the finding of the District Judge that it was the sludge that burned as mere conjecture; * * *" (at p. 306).

The District Court had found:

> "I think that the testimony sufficiently shows the proximate cause of the fire was some substance which surrounded the tug and which caught fire from a means that is not exactly shown, but which should reasonably have been anticipated; * * *."

In dealing with this finding the Circuit Court of Appeals said (at p. 306):

> "We concur in his further finding that to flush the sludge into the river without foreseeing the danger of its being ignited was a want of ordinary and reasonable care."

In *Interlake Iron Corp.* v. *Gartland S. S. Co. (The Burlington)*, 121 F. (2d) 267 (C. C. A. 6), it was held that causal relation should be recognized:

> "whenever the thing done or omitted produces immediate danger of injury and is a substantial factor in bringing it about even though the precise result may not be foreseen. The test of proximity has been satisfied if a generally dangerous result was within the realm of expectability" (at p. 270).

POINT II.

Under the Fire Statute (46 U. S. C. 182) a vessel owner's liability for loss of cargo by fire is established by proof that unseaworthiness existing by reason of the vessel owner's personal neglect was causally related to the spread of the fire and its speed and intensity.

In dealing with the issue of respondent's liability, both the District Court and the Circuit Court of Appeals confined their discussion to the cause of the original outbreak of the fire and did not consider at all the reason for the rapid spread of the fire and its great intensity.

The fire hazard created by an accumulation of lubricating oil on the engine room tank tops and in the bilges has been mentioned in the petition (at p. 7). The District Court reviewed reports taken from the respondent's files and the testimony of respondent's superintending engineers whom it called as witnesses, establishing that for months there had been an abnormal leakage of lubricating oil from the crank cases of the main engines of the "Silverecypress", the loss on the last round voyage totaling some 6,000 gallons (R. 1315, 1318-1319). It pointed out that it was known before the vessel sailed on the

voyage on which the fire occurred, that this leakage resulted from defects in certain sealing bars designed to make the main engine crank cases oiltight (R. 1319, 1321), these defects permitting oil to leak out on the engine room tank tops and into the bilges (R. 1318); that only partial repairs were made on these bars before the last voyage commenced (R. 1319, 1321); that no repairs were made on them during the course of the last voyage (R. 1321); and that this defect existed by reason of respondent's personal neglect (R. 1313; Conclusion 2, 1341).

Both respondent's rules and the rules of the classification societies required that the engine room tank tops and bilges be kept free of oil because of the fire hazard presented by the presence of oil (Resp. Supt. Eng., R. 507, 574).

The abnormal loss of lubricating oil was a serious defect which the District Court found (R. 1313):

> "required specific attention by their (respondent's) accredited representative at Hongkong, and the indifference and inattention of Stephenson* and Cropley* is incredible."

The District Court reviewed the evidence establishing that a few seconds after the fire broke out around the #2 engine "the starboard bilge then caught fire" and that one of the engineers, in attempting to escape from the engine room, "crossed to the port side of the engine room to which the flames had then extended * * *" (R. 1307). As the engineers were working on the floor plates, the flames must have reached the port side of the engine room by running over the tank tops under the floor plates. If the vessel had been in normally safe condition there would have been nothing in the bilges and on the tank tops to burn.

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* Respondent's superintending engineers.

The Circuit Court of Appeals made but one comment in relation to the leakage of lubricating oil (R. 1371):

> "There was also evidence of an unusual loss of lubricating oil but that, too, indicated only a lack of engine repairs and mostly in respect to the main engines which were idle when the fire started."

Undoubtedly the leakage of lubricating oil upon the tank tops and into the bilges resulted from lack of repair of the main engines, but the District Court found that the disrepair of the main engines which permitted this leakage, resulted from respondent's personal neglect (R. 1313; Conclusion 2, R. 1341); and the Circuit Court of Appeals made no finding to the contrary.

The fact that the main engines were idle when the fire broke out does not, we submit, affect the relevancy of the defect we are discussing. The engine room tank tops and bilges were necessarily covered with oil as the result of the use of the main engines on the voyage from United States ports to Ilo Ilo: the main engines had been in use up to about 2:30 P. M. on January 12th, *i. e.*, some 13 hours before the fire broke out (R. 1029). Neither the District Court nor the Circuit Court of Appeals suggested that there was any evidence that the tank tops and bilges had been cleaned subsequent to the vessel's arrival: the evidence is in fact to the contrary. Respondent's witness, the second engineer, whose testimony the District Court characterized as a "myriad of conjectures and a labyrinth of contradictions" (R. 1305), testified that the tank tops were washed off with a hose every Saturday (R. 264). However, even if his testimony is accepted at face value, it does not indicate that the fire hazard was materially reduced, excepting, possibly, for a brief period on Saturday, since nothing was done to stop the continued leakage. The fire broke out on Wednesday.

Whatever may have been the initial cause of the outbreak of fire, the quantity of oil on the tank tops and in the bilges resulting from respondent's personal neglect, could not help but add to the extent and intensity of the fire.

In the petition (at pp. 16-17) we have quoted from the conclusion of the District Court that the libellants were not entitled to recover because they had not proved that the fire resulted "solely" from unseaworthiness. As that court found that the cause of the outbreak of the fire was not established, presumably it considered irrelevant the cause of the spread of the fire. Apparently, the Circuit Court of Appeals agreed with that conclusion.

Petitioners submit that respondent's liability is established if its personal neglect was causally related to the spread of the fire, whatever may have been the cause of its original outbreak.

Walker v. *Transp. Co.*, 3 Wallace 150, 153;
Hines v. *Butler*, 264 Fed. 986 (D. of Md.); 278 Fed. 877 (C. C. A. 4);
U. S. v. *Charbonnier*, 45 F. (2d) 174 (C. C. A. 4);
Christopher v. *Grueby*, 40 F. (2d) 8 (C. C. A. 1).

In *Hines* v. *Butler* (*supra*) the S. S. "Virginia" was destroyed by fire with heavy loss of life and cargo. The District Court found that the cause of the original outbreak of the fire was unknown (264 Fed. at p. 990). It stated that in relation to the rights of the cargo owners against the vessel owner, this was the issue presented: "Was the fire or the failure to extinguish it before harm was done the result of the negligence of the petitioners?" (at p. 988). It found that the sprinkler system on the vessel could not be used because of her owner's personal neglect and that "But for such negligence, the fire might have been extinguished before the cargo was destroyed. Consequently, section 4282 (the Fire Statute) does not

protect the petitioners against the claims of the owners of the lost merchandise" (at p. 996).

The Circuit Court of Appeals for the Fourth Circuit affirmed the judgment below. It found "that there was an entire lack of fire apparatus in proper condition to fight the fire" (278 Fed. at p. 878); and that as this condition resulted from the vessel owner's personal neglect, it was not entitled to the exemptions of the Fire Statute (at p. 880).

In *Christopher* v. *Grucby* (*supra*) it was held that the vessel involved was insufficiently equipped with fire extinguishers (40 F. (2d) at pp. 11, 12). The Circuit Court of Appeals for the First Circuit said (at p. 13):

> "Whether the fire was started by a spark from a wire, or by a spark from the uncovered generator brushes, or from the backfire of the engine, or from some other source, it can reasonably be found that the negligent situation, which the owners had created and/or suffered to exist in the engine room, and their failure to furnish adequate means 'ready for immediate use' for 'promptly and effectually extinguishing burning gasoline', one or both, were the cause of the loss of the ship, of the lives of twelve of the crew, and of the injury of three others."

The court found that the vessel owners were personally negligent in relation to the insufficiency of the fire extinguishers and the vessel owner's petition for limitation of liability was denied.

In *Walker* v. *Transp. Co.* (*supra*), this Court said that the Fire Statute "goes so far as to relieve the shipowner from liability for loss by fire, to which he has not contributed either by his own design or neglect" (3 Wallace at p. 153).

In *U. S.* v. *Charbonnier* (*supra*), the vessel owner was

held liable for the loss of the libellant's cargo by fire because the vessel owner's personal neglect "helped to bring about the catastrophe which took place" and "contributed as a proximate cause to the fire" (45 F. (2d) at p. 176).

POINT III.

The decision below that causal relationship between the unseaworthiness of the "Silvercypress" and the fire, was not established, was an error of law.

The conclusion of the lower courts that causal relationship between the fire and the unseaworthiness of the "Silvercypress" was not established is negatived by the actual facts found by both courts. The courts below concluded, erroneously, petitioners submit, that under the Fire Statute no inference of causal relationship can be drawn. The decision that causal relationship was not established was a conclusion of law. *Baumgartner v. United States*, ... U. S. ... (decided June 12, 1944).

CONCLUSION.

Petitioners respectfully submit that writs of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the questions presented and because the decision in the present cases is directly contrary to the settled law of the First, Fourth and Sixth Circuits.

Respectfully submitted,

D. ROGER ENGLAR,
HENRY N. LONGLEY,
Counsel for Petitioners.

Dated, New York, August 31, 1944.

APPENDIX.

Fire Statute.

(Act of March 3, 1851, C. 43, par. 1; R. S. Sec. 4282; Title 46, U. S. C. Sec. 182)

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

Limited Liability Statute.

(Act of March 3, 1851, C. 43, par. 3; R. S. Sec. 4283; Title 46, U. S. C. Sec. 183)

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

SEP 26 1944
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 430

HOSKYN & CO., INC., *et al.*, *Petitioners,*

against

SILVER LINE, LTD., *Respondent.*

INTERNATIONAL STANDARD ELECTRIC CORP., *et al.*, *Petitioners,*

against

SILVER LINE, LTD., *Respondent.*

CHINA GENERAL EDISON CO., INC., *Petitioner,*

against

SILVER LINE, LTD., *Respondent.*

BRIEF OF RESPONDENT SILVER LINE, LTD. in opposition to PETITION FOR WRITS OF CERTIORARI

GEORGE DE FOREST LORD,
Counsel for Respondent.

THOMAS F. DALY,
of Counsel.

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Preliminary Statement

The petitioners seek Writs of Certiorari addressed to the United States Circuit Court of Appeals for the Second Circuit to the end that the affirmance by the Circuit Court of Appeals for the Second Circuit of the judgments of the

United States District Court for the Southern District of New York may be reviewed here.

Eighteen libels were filed in the District Court in or about the early part of 1938 as a result of a fire on board respondent's vessel, the M. V. SILVERCYPRESS, on January 13, 1937 while anchored in the harbor at Ilo Ilo, P. I. These libels were by the order of the District Court consolidated for the purpose of trial under the title of *Hoskyn & Co., Inc.* against *Silver Line, Ltd.*

Before trial, counsel had selected the following four cases as typical and stipulated that the decision as to the cause and liability for the fire in those cases would control the decision of the other fourteen cases upon that issue: Hoskyn & Co., Inc., et al.; International Standard Electric Corp., et al.; China General Edison Co., Inc.; Pacific Commercial Company.

The cases were tried as one before the District Court for twelve consecutive court days. The trial ended April 22, 1942. Subsequently, exhaustive briefs were submitted to the District Court by both parties. The District Court on January 11, 1943 filed an opinion dismissing all of the libels. (R. pp. 1296-1332) On March 25, 1943, the Court filed a supplemental opinion. (R. pp. 1332-1337) In that opinion it found in favor of libellant in the case of *Pacific Commercial Company* on the ground that as the proximate cause of the loss was the over-carriage of the goods from Manila to Ilo Ilo and not the fire, respondent was not entitled to the benefit of the Fire Statute. Decrees were entered in the District Court in favor of the respondent in the first three of the above cases and in favor of libellant in the fourth case. Because of the small amount involved ($80.) in that case, respondent did not feel that an appeal was warranted. Petitioners appealed from the decrees in the first three cases and the United States Circuit Court of Appeals for the Second Circuit affirmed the decrees in those cases with a decision written by Judge CHASE on June 8, 1944 (143 Fed. (2d) 462). Petition for a rehearing was denied on June 26, 1944.

Although petitioners claim there is a conflict with decisions of other Circuit Courts of Appeal, as explained below (Point III), there is no such conflict. None of the reasons set forth in Rule XXXVIII 5(b) is present in this case. The sole question presented to this Court is whether the petitioners discharged the burden which petitioners concede in their brief (p. 10) is placed upon them by the Fire Statute (46 U. S. C. 182) of showing that the fire was caused by respondent's neglect. The District Court ruled on the facts that they did not meet that burden and the Circuit Court of Appeals affirmed this ruling on the facts.

The following language from Judge CHASE's opinion shows the precise nature of the question involved and, by the same token, makes obvious the reasons why certiorari should not be granted. *Inter alia,* Judge CHASE wrote:

> "It was accordingly found, and is not now seriously disputed, that the vessel was unseaworthy when she sailed and continued to be unseaworthy up to the time of the fire, and that such condition was due to the neglect of the owner. Consequently the issue is further narrowed to the question whether it was shown that the neglect of the owner which allowed the No. 2 starboard auxiliary to be used while it remained in the condition that made the ship unseaworthy caused the fire. Compare *Christopher* v. *Grueby,* 1 Cir., 40 F. (2) 8.
>
> "This was an extremely difficult question to resolve in point of fact because the engine room was gutted and when it could be entered after the fire so much damage had been done that no definite evidence concerning the cause of the fire could then be obtained.
>
> "Some facts as to conditions in the engine room just before the fire were proved, however, and there was evidence that a relief valve in one of the engine's cylinders then opened and let out hot gases and sparks. The libellants directed most of their energies to attempting to show that the fire was caused by the spraying of oil from a small intake pipe against the hot exhaust pipes and the hot cylinder head when excessive vibration caused the pipe to break. Yet there was no

evidence that such a pipe did in fact break before the fire started. The respondent put forth a (fol. 1373) contrary theory supported by the testimony of its expert to the effect that an overhead fuel pipe in the engine room might have sprung a leak, with results later to be given. Yet there was no credible evidence that such a leak did occur so all was left to speculation. Such an occurrence, however, could not reasonably be connected with the owner's proved neglect to repair the engines. So there was expert testimony pointing to a possible cause of the fire connected with the owner's neglect to put the auxiliaries in good repair after notice and testimony just as expert pointing to a possible cause unconnected with any neglect of the owner. There was also evidence of an unusual loss of lubricating oil but that, too, indicated only a lack of engine repair and mostly in respect to the main engines which were idle when the fire started. The trial judge could not find whether either theory as to the cause of the fire was the correct one, or what did in fact cause it.

"The word 'theory' has been used deliberately for it is apparent that no one can do more on the evidence in this record than to speculate, and right there the weakness of the libellants' cause is revealed. The statute placed upon them a burden it was impossible to carry, as will now be seen from a discussion of the available and proved facts in connection with the operation of a Diesel engine of the multiple-cylinder four-cycle type of the auxiliaries in this vessel."

After discussing the evidence adduced, Judge CHASE concluded:

"It is no wonder that on this sort of evidence the trial judge could not decide which, if either, of these theories showed how the fire was caused or find what as a matter of fact did start it, and he had to leave that vital question unanswered. There is, therefore, nothing in this record which shows reversible error in respect to any of the decrees.

"On the contrary there is ample support for the negative finding that the cause of the fire was not

proved. Consequently it was not shown that any neglect of the owner caused it and such a finding is to be given effect on appeal. Compare *Petterson Lighterage & T. Corp.* v. *New York Central R. Co.*, 2 Cir., 126 F. (2) 992. That leaves the libellants short of having proved a cause of action, for the unseaworthiness of the ship did not alone deprive the respondent of the benefit of the fire statute. *Globe & Rutgers Fire Ins. Co.* v. *United States, supra.*"

The United States District Court for the Southern District and the United States Circuit Court of Appeals for the Second Circuit, after an exhaustive review of the facts, held that petitioners did not show that the fire was caused by respondent's neglect. The Supreme Court of the United States is now asked to be the third court to pass on that factual question.

The petition falls squarely within the frequently announced rule of this Court that "granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

General Pictures Company v. *Electric Company* (1937), 304 U. S. 175, at page 178;

Southern Power Company v. *N. C. Public Service Company* (1923), 263 U. S. 508.

Statement of Fact

At the trial petitioners read into the record the testimony of one Ingram, a disgruntled and thoroughly discredited former employee of the respondent, with respect to conditions in the engine room of the vessel. Ingram had been an engineer on the SILVERCYPRESS and was present in the engine room immediately before and at the time the fire broke out. (Opinion of the District Court (3981-3982, 3990; 2700-2727, 2736-2785, 3195-3212, 3220-3231.*) Ingram was the only factual witness called by petitioners.

* References are to folios of the record unless otherwise stated.

The only other witness called by them was an expert on Diesel engines.

Prior to the trial, pursuant to an order of discovery, a large number of documents was produced from the files of respondent, many of which were offered in evidence by petitioners and many by respondent. (Opinion, District Court, 3897)

On its behalf, respondent called as witnesses or read into evidence the depositions of various of its engineers and others. It also called as witnesses three experts thoroughly familiar with the operations of Diesel engines. (722, 1310, 1768, 1774, 2021-2027, 2062, 2072-2080, 2152, 2244, 2264-2271, 2818-2950, 2951-3053, 3050-3194)

The SILVERCYPRESS under Lloyd's inspection and at the time of the fire was classed by Lloyd's as + 100 A-1. (3077) She was a modern vessel built in 1930, being completed in June of that year. She and other ships of the respondent made around-the-world voyages carrying cargo and passengers from the United States to Manila and Far East ports where they also picked up cargo and passengers for the return to the United States. Each voyage took about four and one-half months to complete. (724, 3056, 3060, 3061) The voyage on which the fire occurred commenced at New York on November 24, 1936. Thereafter, on the afternoon of January 12, 1937, the SILVERCYPRESS brought up to anchor in the harbor at Ilo Ilo, P. I. Immediately after anchoring at 3:30 P. M., the ship commenced discharging cargo from all holds. This continued throughout the night and until the fire broke out in the engine room at 3:45 A. M. on the 13th. The fire took hold very rapidly and within a matter of a few minutes after the start of the fire, flames and sparks coming out of the engine room skylights were blown aft and ignited the cargo in the after holds of the ship, the hatch covers being off all holds to permit the unloading of the cargo. The fire burned for over seven days, not being extinguished until January 20, at 4:20 P. M. (Chief Officer's Log, Exs. 4-35-a; 4-35-c; 3517; Lib. Ex. 21, at 3666)

Other pertinent facts will be referred to hereafter.

POINT I

The District Court's and the Circuit Court of Appeals' finding on the facts that the cause of the fire was not proved being amply supported by the evidence should not be disturbed.

The District Court in its Supplemental Opinion (3997) succinctly stated its reasons for dismissing the libels in the following language:

> "Inasmuch as the record disclosed that the fire resulted from one of two or more causes, and the causal connection between the fire and any particular cause and the personal negligence of the Respondent was not established by the required measure of proof, the Respondent was exonerated under the Fire clause."

The pertinent finding of fact was:

> "8. The precise origin of the fire was not established and resulted from one of two or more causes." (4019)

and the Court's conclusion of law was:

> "3. The libellants failed to establish, by the required measure of proof, a causal connection between the fire which destroyed the 'Silvercypress' and her cargo, and the unseaworthiness of the vessel due to the personal neglect of the respondent.
>
> "4. The respondent is, therefore, entitled to the benefit and protection of the Fire Statute, * * *." (4022)

The Circuit Court of Appeals in commenting on and in concurring with the District Court's finding of fact stated:

> "On the contrary there is ample support for the negative finding that the cause of the fire was not proved." (C. C. A. Opinion, p. 1375)

Accordingly, since the District Court and Circuit Court of Appeals have found as a fact, which fact is amply supported by the evidence (as hereinafter demonstrated), "* * * that the cause of the fire was not proved," such finding should not be disturbed.

Just v. *Chambers* (1940), 312 U. S. 383;
Texas & No. O. R. Co. v. *Ry. Clerks* (1929), 281 U. S. 548.

POINT II

The District Court and the Circuit Court of Appeals properly found that the cause of the fire was not proved.

The fire started on the top of or near the No. 2 auxiliary generator. Petitioners' "theory" of the fire is that the No. 2 generator was overheated from improper timing, that excess vibration due to the faulty condition of the engine broke or fractured a ⅛" fuel pipe leading from a fuel pump on the No. 2 generator to a cylinder of that generator, that the break or fracture of the small fuel pipe resulted in the spraying out of a cloud of oil in vapor form which came in contact with the overheated engine, thus causing the fire, and that the fire was supported by large quantities of lubricating oil which had escaped from the crankcases of the main engines. (Opinion, C. C. A., pp. 1371-1374)

No eyewitness testified to any such conditions existing at the time of the fire. The "*theory*" consisted merely of conclusions drawn by petitioners from purely circumstantial evidence. (Opinion, C. C. A., p. 1372) Their own factual witness Ingram, who was present in the engine room before and at the time of the fire, did not testify to the existence of any such conditions at the time of the fire.

Petitioners' "*theory*" as to the cause and the extent of the fire necessarily implies: (a) abnormal vibration of

the No. 2 generator causing a ⅛" pipe (carrying one gallon of fuel oil an hour) to break; (b) late timing of the generator causing the exhaust manifolds to become overheated; and (c) large quantities of lubricating oil on the tank tops and in the bilges.

A. Vibration

We deal first with petitioners' contention that the fire was caused by the breaking of a small ⅛" fuel pipe, which break was caused by vibration resulting from the unseaworthy condition of the engine. This point was urged strongly below both in the District Court and the Circuit Court of Appeals. The District Court, however, made no finding that any vibration, abnormal or otherwise, existed in these engines, particularly in No. 2, or that such a small fuel pipe broke, and the Circuit Court of Appeals expressly found that there was no evidence "* * * that there was vibration which in fact caused a leak in a fuel pipe in the manner described." (Opinion, C. C. A., p. 1374)

The testimony of petitioners' own factual witness Ingram negatives the inference that there was any abnormal vibration present in these engines. Ingram testified in one of his several opinions as to the cause of the fire that in his opinion one of the small ⅛" pipes on the No. 2 generator fractured due to vibration caused (according to him) by the *tieing back of the governor handle or throttle on that generator.* (2663, 2673) When the load was taken off that engine, this tieing back is said by him to have caused the engine to race and, accordingly, vibrate. (2663) Ingram does not otherwise refer to vibration of the generator at all. Ingram's explanation for vibration is not advanced by petitioners for obvious reasons. It was shown definitely on the trial that it would have been a mechanical and electrical impossibility to operate the generators at all under the conditions prevailing previous to and at the time of the fire with the governor handles tied back. (C. C. A. Opinion, pp. 1373-4; 2029, 2131, 2341, 2498)

The District Court did not believe Ingram's impossible story. Indeed, even petitioners' expert did not believe Ingram's testimony (561) and did not use it as a basis for any opinion expressed by him. He admitted that the No. 2 generator could not have operated with the governor handle tied back. (2498) After offering Ingram's testimony, petitioners do not now rely upon it at all, nor could they, as it contradicts their theory of vibration. It seems obvious that if any abnormal vibration existed, Ingram, the disgruntled employee, need not and would not have invented his impossible story to explain the supposed breaking of the small fuel pipe.

Thus, petitioners' case as to vibration was founded only on the opinion testimony of their expert witness. His opinion, however, was only to the effect that there "might have been" abnormal vibration in the engines. (337, 339) His opinion was based on an examination of the records and exhibits in the case. His testimony that there "might have been" vibration is flatly contradicted by all of respondent's fact witnesses and is negatived by petitioners' own witness Ingram, who testified, as pointed out above, that vibration only existed when the load was taken off the generator and the governor handle tied back, a condition which petitioners' expert rejected as impossible. (777, 785, 1391, 2498) It was further refuted by the respondent's experts who (from an examination of the same records as were examined by petitioners' expert) gave as their opinions that there was nothing in such records to indicate any abnormal vibration in any of the generators. (2114, 2319) Under these circumstances, it is obvious why the Circuit Court of Appeals found as a fact that there was no evidence "* * * that there was vibration which in fact caused a leak in a fuel pipe in the manner described" (C. C. A. Opinion, p. 1374) and why the District Court made no finding that any vibration, abnormal or otherwise, existed in these engines or that it caused a fuel pipe to break.

B. Timing

Petitioners lay emphasis here, as they did in the District Court and the Circuit Court of Appeals, upon an alleged defective condition of the timing apparatus on the No. 2 generator. The reason for this emphasis is the assumption by the petitioners that *if* the so-called "late timing" could be established as having existed at the time of the fire, it would necessarily lead to the inference that the engine itself, or at least the exhaust pipes or exhaust manifold of that engine, was white hot, and to the further inference that loose fuel oil escaping from the assumed fracture of a small fuel pipe on No. 2 generator was ignited by these white hot exhaust pipes or manifold. It is obvious, therefore, that this is a theory as to the cause of the fire built upon a number of successive inferences, none of which is justified by the known facts.

Before examining the successive steps necessary to sustain this theory and pointing out their speculative natures, respondent calls attention to the fact that the Circuit Court of Appeals found that there was no evidence that faulty timing "did in fact overheat the engine just before the fire" (C. C. A. Opinion, p. 1374), and the District Court made no finding that the timing of the No. 2 generator was "late" or that the engine was overheated at the time of the fire.

Every instance which appears in the record of any "late timing" of the engines is definitely shown by the factual witnesses or by the records to have been corrected long before the fire. (754, 756, 761, 763-4, 1291, 1424, 1428-1431, 1717, 2088-2097, 2115, 2303, 2318, 2349-50) Since petitioners did not establish that "late timing" existed at the time of the fire, the subject becomes of no importance because it is not claimed, nor could it be, that "late timing" of an engine at an earlier date created an overheating of the engine exhaust or manifold at the time of the fire.

That the timing of the generators, particularly the No. 2, was in order on Voyage 17 and on the night of the fire is substantiated by the testimony of petitioners' own factual

witness Ingram as well as by other witnesses. Ingram makes *no mention whatsoever* of the alleged defect or looseness in the sprocket wheel of No. 2 generator which, if it existed, petitioners contended would result in late timing. Furthermore, he admitted in his testimony that the "late timing" which may have existed on a previous voyage had been corrected before the start of the voyage on which the fire occurred. (2618)

It thus appears that petitioners' contention here and in the District Court that late timing existed in the No. 2 generator at the time of the fire is not only based upon inference but is contrary to the known facts.

Moreover, the known facts do not sustain petitioners' contention that an overheated exhaust pipe or manifold ignited the fuel oil. The *known and undisputed* fact is that the safety or relief valves on the Nos. 2 and 3 cylinders of the No. 2 generator had been opening intermittently for some minutes before and up to the start of the fire with the result that white hot flames and sparks were being shot out from them. (2626, 2822, 3586, 3607, 3623, 3649; District Court Opinion, 3919) It further disregards the fact *admitted by all of the witnesses,* including petitioners' own expert, that the white hot flames and sparks shot out from the relief valves could, without any intervening cause, ignite loose fuel oil on or in the vicinity of the No. 2 generator. (630, 1480, 1813, 2142, 2338) Ingram referred to another possible cause for the ignition of fuel oil in his eyewitness reference to sparks being thrown out by the No. 1 generator commutator. (3609)

C. Lubricating Oil

Petitioners' brief (Point II) states that leakage of lubricating oil in the two main engine crankcases was an inevitably important contributing cause of the fire on the SILVERCYPRESS.

As a matter of fact, lubricating oil is not once mentioned in the findings of the District Court, and the Circuit Court of Appeals expressly found that leakage of

lubricating oil was not a contributing cause of the fire (C. C. A. Opinion, p. 1371), although in both courts this point was strongly urged by petitioners.

The statements in the District Court's opinion referred to by the petitioners in their brief at pages 28 and 29 merely recount testimony of witnesses as to whether or not there was a loss of lubricating oil on the previous voyage, and conjectures as to how such loss may have occurred. There was no finding by the District Court on the subject of the presence of lubricating oil on the tank tops or in the bilges. Furthermore the comments in its opinion relate to the previous voyage and the subsequent repairs made in New York included tightening all holding down bolts on both main engines, removing and cleaning the sealing bars on the starboard engine and rejointing them, and rejointing the worst sealing bars in the port engine. There is no mention of any loss of lubricating oil in any of the testimony subsequent to these repairs; nor is there a single word of testimony that there was lubricating oil on the tank tops or in the bilges at any stage of Voyage 17. Indeed the evidence is to the contrary. (Exhibit LL; 933-936)

Moreover, there is no evidence that even on the previous voyage the so-called "shortage" found its way to the tank tops or the bilges or that if it did it would have contributed to the fire on Voyage 17. In fact, there is a real question of whether there was any leakage at all.

The Chief Engineer of the SILVERCYPRESS did not believe that lubricating oil was leaking out of the crankcases of the main engines. In an endeavor to account to his owners for a "shortage" of lubricating oil, he reported by letter on September 25, 1936 that

> "I have made a thorough examination of cofferdams, dry tank, tank tops and pipe lines and have not been able to find any appreciable leakage. * * *
>
> "* * * I think there can be no doubt the reason for this big shortage is entirely due to the amount of sludge and water taken from the system. * * * I

have not been able to find out how the water got into the system; * * *." (Lib. Ex. 4-25, 3459, 3460)

Moreover, in a further report to his owners, dated December 2, 1936, he again attributed the "shortgage" to contamination by sea water leaking into the main engine lubricating oil system rather than to oil leaking out. (Lib. Ex. 4-28-b, at 3483) Others were of the opinion that there was no shortage and hence no appreciable leakage but that the lubricating oil was being *consumed* in the engines. 797, 1356, 2277-2281) But even if we assume that the "shortage" of lubricating oil was fully accounted for by leaks rather than by contamination by sea water or consumption, and even if we assume that the lubricating oil went on to the tank tops and from them into the bilges, nevertheless, such loss over a period of seven months would not be material in so far as the fire on January 13 was concerned.

The construction of the tank tops was such that no substantial quantity of oil could accumulate on them. (Resp. Exs. PP and ZZ; 905, 3808, 3856) Not only the construction of the tank tops but the constant rolling of the ship at sea makes it inevitable that any liquid, either water or oil, present there would go into the bilges. Moreover, they were hosed down each Saturday (792), and respondent's second engineer testified that they were clean the Saturday before the fire. (794-5) Petitioners imply, at page 30 of their brief, that the second engineer was testifying untruthfully when he stated that the tank tops were hosed down each Saturday. They neglect to point out that his testimony to that effect was substantiated by their own witness Ingram. (2565)

The 6,000 gallon loss of lubricating oil reported on the previous voyage and referred to by petitioners in their brief consisted of a "shortage" of 4950 gallons on the voyage to Hongkong and 1440 gallons between Singapore, the next port of call after Hongkong, and New York. (Lib. Exs. 4-39, 4-28-b, at 3533, 3482)

The tank tops, bilges, etc., were thoroughly cleaned at Hongkong on the previous voyage. (Bill of A. Hong, Lib. Ex. 4-21-c, at 3424; 909-12) Hence, any shortage prior to that time certainly has no bearing on the fire. The recorded "shortage" between Singapore and New York of 1440 gallons on that voyage, divided by the number of days shown gives a "loss" of about 24 gallons per day. This would mean that no more than 4 gallons could leak out during any one watch of which presumably 2 gallons would be on the starboard side and 2 gallons on the port side, and, of course, it is undisputed that the bilges were pumped out each watch. (797-8, 2686) Furthermore, the main engines had not been running from 2:49 of the afternoon of January 12, the day previous to the fire (Chief Officer's log Ex. 4-35 a, b, c, at 3517; C. C. A. Opinion, p. 1371), so that no oil could have leaked out from that time until the fire, and the bilges had been pumped just before going into port. (797) Petitioners, however, have intimated that although the bilges were pumped out each watch and had been pumped out before going into Ilo Ilo, nevertheless, a large quantity of oil still could have remained in the bilges. This is an inference contrary to the facts. The evidence shows (1022) that the bilge pump suctions, which are at the after end of the engine room bilges, are no more than 3 inches from the bottom of the bilges and that the vessel being down by the stern, all the contents of the bilges would be pumped out except for a small bit in the immediate vicinity of the bilge suctions.

Even petitioners' witness Ingram (2567) says there was only a "skim of oil on the water" in the bilges the day before the fire; in other words, a trace of oil which, of course, is present in any motorship. That they were in normal condition was confirmed by respondent's witness. (797-8)

Obviously, if there had been any substantial accumulation of oil on the tank tops or in the bilges, not only Ingram, but the other engineers would have seen it, and the Chief Engineer would have reported it. It is ridiculous to be-

lieve that the Chief Engineer would have wasted his time trying to account to his owners for a "shortage" of lubricating oil if it had shown up on the tank tops or in the bilges. Similarly, Ingram would have seized upon this as one of his most vital criticisms of the ship rather than a casual reference to a "skim" of oil.

Furthermore, we point out that the Chief Engineer's list of repairs (3505, *et seq.*) to be made at Hongkong on the last voyage made no reference whatsoever to any defective condition of the sealing bars and holding down bolts in either main engine and no reference to any leakage of oil from those engines.

Reference is made in petitioners' brief to their witness Ingram's testimony that shortly after the fire broke out, flames mounted up on the other side of the engine room. However, they neglect to point out that Ingram did not attribute the outbreak of fire on the port side to the alleged leakage of lubricating oil. (2666, 3656-8)

From the above it is apparent that petitioners failed to prove the three essential elements necessary to their theory as to the cause of the fire, namely (a) vibration which caused the breaking of a pipe; (b) defective timing which caused the engine to overheat; and (c) leakage of lubricating oil which caused the fire to spread. Proof of all three elements is necessary to sustain petitioners' theory and hold the respondent for the fire. This is a case where failure of proof went, not only to one essential element but to all three. Petitioners failed in the following respects: (a) They drew one inference when several might have been drawn. (b) They disregarded known facts material to any explanation of the fire. (c) They based inference upon inference as a substitute for proof.

Respondent's Theory Concerning the Cause of the Fire.

Petitioners' "theory" as to the cause of the fire ignores the only two things that are *known* concerning conditions in the vicinity of the No. 2 generator at the time the fire

broke out. These are (1) that the relief or safety valves on the No. 2 and 3 cylinders of the No. 2 generator, as pointed out above, were lifting and discharging white hot flames and carbon sparks; (2626, 2681, 2723, 2822, 2852, 2867, 2921, 3586, 3609, 3623, 3630, 3647, 3649) (2) that there was a considerable quantity of fuel oil on the floor plates at the forward end and outboard of the No. 2 generator just previous to and at the time of the fire. (2634, 2674, 3608; Diagram, 3616, 3665)

Respondent's witnesses testified that in their opinion (which took into consideration the known facts) the fire occurred in the following manner:

A large overhead fuel pipe broke or sprang a substantial leak. [Concededly, the breaking of such an overhead fuel pipe could not be charged to respondent's neglect. (C. C. A. Opinion, pp. 1371, 1375)] The oil therefrom fell or was sprayed onto the cylinder tops and around the No. 2 generator and an unknown quantity of this oil, falling on the air intakes of the cylinders, was drawn into the cylinders by suction, causing overloads in the cylinders, the overloads causing the relief valves to lift; that part of the oil which fell from the large overhead pipe on to the generator itself was heated to its fire point by the normal operating heat of the generator, and gave off an inflammable vapor; the continuous opening of the relief valves (caused by the excess oil from the air intake overloading the cylinders) permitted hot carbon and flame to shoot out at each explosion and, thus coming in contact with the vaporized oil, ignited it. (1473-86, 1813-15, 2138-45, 2335-41; Dist. Court Opinion, 3968-3981; C. C. A. Opinion, pp. 1374, 1375)

That fuel oil leaking from an overhead fuel pipe sucked into the air intakes would bring about a condition of excessive fuel in the cylinder which in turn would cause the relief valves to lift with the result that the loose fuel oil admittedly in the vicinity heated to its fire point by the normal operating heat of the generator would be ignited was admitted by everyone, including petitioners' expert.

(C. C. A. Opinion, pp. 1374-5; 594, 630, 1479, 1480, 1813, 2141-2, 2338) Unlike petitioners' "theory", this theory does not require an *inference* that the exhaust manifolds were abnormally heated, for, as pointed out above, the white hot flames and carbon shot out from the lifting relief valves admittedly would have been sufficient to ignite the loose fuel oil.

Respondent's witnesses pointed out that there was no other source for the large quantities of fuel oil which ignited immediately, nor any explanation other than the breaking of a large fuel supply pipe for the size of the fire which filled the engine room in a few minutes. In commenting on petitioners' theory that a *small* fuel pipe or by-pass valve on the No. 2 generator fractured, they testified that in their opinion the quantity of fuel oil, amounting to about *one gallon an hour*, which would flow from such broken 1/8" fuel pipe or by-pass valve could not have caused the fire of the magnitude described by Ingram. (2143, 2339, 2406) Their opinion also finds support in the written statement made by one of respondent's engineers after the fire (3689) that a 3/4" branch overhead fuel pipe had been found broken off and his testimony covering his conversation with Ingram after the fire. (1796) Once this fuel supply pipe was broken, oil would continue to flow out of it by gravity until the tank—said by Ingram to contain 1700 gallons (2683) was empty. It is further borne out by Ingram's testimony that there was a considerable quantity of fuel oil on the floor plates at the forward end of and the outboard side of the No. 2 generator just previous to and at the time of the fire. (2634, 2674, 3608; Diagram, 3616, 3665)

The breaking or leaking of a large overhead fuel pipe is almost the only explanation for the presence of the fuel oil that Ingram states he saw glistening on the floor plates.

This oil, Ingram stated, extended the whole way from where he was standing (Diagram Ex. 19, 3616) around back of the generator No. 2 and to the starboard bilge outboard.

As heretofore pointed out, the presence of this oil is not even mentioned by petitioners in their brief. That it was fuel oil is absolutely clear from Ingram's testimony to the effect that he knew it was fuel oil because it was the color of brandy, whereas lubricating oil is greeny blue in color. (2635)

There are many reasons which might cause such an overhead pipe to break, among them the following: The rolling of the ship in a seaway which causes the weights in the engine room to pull away from the side of the ship which sets up strain, resulting eventually in the fracturing of pipes. (1392, 1576) Crystallization of the metal is another cause of pipes giving out. (2048) The laboring of a ship in heavy weather will cause pipes to fracture, although such fractures may not show up for some time after the heavy weather was encountered. Pipes break or fracture for no apparent reason whatsoever. (430, 2147, 2356-7, 2417)

Petitioners in their brief imply as they did below that it is far-fetched to believe that if the leak had occurred in an overhead pipe, the men in the vicinity would not have been covered with oil while standing at the No. 2 generator. However, as no one knew the exact location of the overhead fuel pipe, no one can say for certain where the break or fracture occurred. (1987, 2196) Furthermore, no one knows in what way the oil would have been falling out from the break or fracture. It might have sprayed in any direction. It was the considered opinion of the experts that it did not necessarily have to fall straight down, nor that it would necessarily fall upon the two men standing at the No. 2 generator. (2199-2202, 2408)

It is thus apparent that the inferences which petitioners sought to draw, and which inferences ignore the two known facts in this case, *i. e.*, the lifting of the relief valves and the quantity of fuel oil on the floor plates at the forward end and outboard of the No. 2 generator, are not the only or probable ones which can fairly and reasonably be drawn from the facts. Nor, as shown above, did petitioners'

theory as to the cause of the fire fairly and reasonably exclude any other explanation for it.

It is thus obvious that the finding of the District Court and the Circuit Court of Appeals that the cause of the fire was not proved and that petitioners accordingly failed to meet the burden placed upon them by the Fire Statute is amply supported by the evidence.

POINT III

The cases cited by petitioners in their brief are not in conflict with the decisions below. Nor were petitioners required to carry more than the ordinary burden placed upon them by the Fire Statute.

It was and is conceded by petitioners that the so-called Fire Statute applied in these cases; that the burden was upon them to show that the fire which destroyed or damaged their cargo was caused by the neglect of the owner and that it is immaterial whether the vessel was or was not seaworthy. (Petition, p. 10)

Accordingly, the situation was like any other where a claimant brings himself within an exemption in which event the libellant must prove that he was negligent.

> *Globe & Rutgers Fire Ins. Co., et al.* v. *U. S. A., et al.* (*The Zaca*), C. C. A., 2nd Cir. (1939), 105 Fed. (2d) 160; cert. denied, 308 U. S. 611.

There can be no argument with the cases cited by petitioners in their brief. Nor is there any conflict between the decision below and the decisions of other Circuit Courts of Appeal cases. In fact, we agree entirely with the principle laid down in the cases cited from other Circuit Courts of Appeal. That principle is that a recovery should be allowed only where the only reasonable inference which can be drawn from all the circumstances lead to the conclusion that the negligence of the person sought to be charged

with liability was a *substantial factor* in causing the injury for which indemnity is sought. In other words, that the owner was guilty of neglect which caused the fire.

Globe & Rutgers Fire Ins. Co., et al. v. *U. S. A., et al.* (*supra*);

Interlake Iron Corp. v. *Gartland S. S. Co.*, C. C. A., 6th Cir. (1941), 121 Fed. (2d) 267; cert. denied, 314 U. S. 681.

In the instant cases, however, both the District Court and the Circuit Court of Appeals found on the facts that petitioners failed to show that it was the owner's neglect which caused the fire.

Both courts found that on the evidence it could not be decided "how the fire was caused or find what as a matter of fact did start it, * * *." (C. C. A. Opinion, pp. 1372, 1375) Under such circumstances, petitioners did not meet the burden concededly placed upon them by the Fire Statute, for, as stated by this Court in *Commercial Molasses Corporation* v. *New York Tank Barge Corporation* (1941), 314 U. S. 104, at page 112, "Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of fact is unable to resolve."

See also, *Boston C. C. & N. Y. Canal Co.* v. *Seaboard Transportation Co.*, C. C. A., 1st Cir. (1921), 270 Fed. 525; cert. denied, 256 U. S. 692.

The petition should be dismissed.

Respectfully submitted,

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CPY7595